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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1944

No. 1303

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

150.29 ACRES OF LAND, MORE OR LESS, IN MILWAUKEE COUNTY, WISCONSIN, and VLASTA KRIZ, et al.,
Defendants.

ELINE'S INC.,
Petitioner and Appellant Below

vs.

LAKESIDE LABORATORIES, INC.,
Respondent and Appellee Below.

PETITION FOR WRIT CERTIORARI FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

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PETITION FOR WRIT CERTIORARI FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

To the Honorable Harlan F. Stone, Chief Justice of the United States, and the associate Justices, Supreme Court of the United States:

The petitioner prays for a writ of certiorari to review the judgment entered March 5, 1945 (motion for rehearing denied March 22, 1945) in the United States Circuit Court of Appeals for the Seventh Circuit, which affirmed a judgment entered by the United States District Court for the Eastern District of Wisconsin in favor of the respondent.

OPINIONS BELOW

The majority opinion of the Circuit Court of Appeals (Circuit Judge William M. Sparks and District Judge Charles G. Briggle) and the minority opinion (Circuit Judge Evan A. Evans are reported in 148 Fed. (2) 39 (R 495-498). No opinion was rendered by the District Court.

JURISDICTION

The judgment of the Circuit Court of Appeals for the Seventh Circuit was entered March 5, 1945. Petition for rehearing was duly and seasonably filed with the Circuit Court of Appeals (R 501), which petition for rehearing was denied March 22, 1945 (R 507). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, C. 229 (43 Stat. 938) (28 U. S. C. A. 347).

The cases believed to sustain jurisdiction are as follows:

Mitchell v. United States, 267 U. S. 341.
Bothwell v. United States, 254 U. S. 231.
United States ex rel T. V. A. v. Powelson, 319 U. S. 266.

SUMMARY STATEMENT

In a condemnation proceeding instituted by the United States under the Second War Powers Act to acquire fee title to an industrial building development of about 670,000 square feet (R 78) owned by petitioner, a fund representing the entire value of the petitioner's lands and buildings as agreed between the United States and the petitioner was paid into the Registry of the District Court.

The respondent, Lakeside Laboratories, used a one-story cafeteria building of approximately 13,200 square feet at a rental ranging from $3,600 to $4,200 per year (R 417). The original lease was entered into on August 11, 1939 and

was for a period of five years, but to accomodate an expanding business, the lease was modified, extending the term of the lease to October 1, 1948, and giving to Lakeside the privilege of erecting at its own expense an annex to the cafeteria building (R 428). A one-story annex of 6511 square feet (R 350, 439) (structurally the same as the original cafeteria (R 162)) was erected in 1941 by Lakeside at a cost of approximately $21,000 (Ex. 26, R 67, 71-73, 78-79, 276-277, 284, 446). The rental stayed approximately the same under the modification. Lakeside did not claim any enhancement in the rental value for the unexpired term of the lease on the cafeteria building (R 175-176). The rental value on the cafeteria building, which was 35c per square foot per year, had not increased over the amount provided in the lease (35c per square foot per year) (R 175-76). Lakeside admitted that the annex erected by Lakeside likewise had a 35c per square foot per year rental value, but did not attempt to value the rental value of the annex for the balance of the term (R 198, 251-252).

Lakeside claimed, as part of just compensation, the reproduction cost of improvements in the cafeteria building added by Lakeside in the sum of $15,145.08, the cost of the annex, $21,027.42, the cost of installing equipment on the premises, $3,820.32, and other minor amounts, totalling $41,762.92 (Shown on Exhibit 26, R 445-453, 277), and received in evidence over the objection of Eline's (67, 71-73, 78-79, 276-277, 284) despite the provision in the lease to the effect that all improvements placed on the premises by Lakeside were to become the property of Eline's and be surrendered on termination of the lease by lapse of time or otherwise (R 406, 417, 429) and despite the fact that no evidence as to the value of the use of these improvements during the balance of the term was offered by Lakeside (R 144-145, 246, 251).

In addition to the foregoing element, Lakeside claimed as part of just compensation so-called "'ready-to-go" value (R 176, 208-209, 225). The trial court, over objection of Eline's (R 208-210, 212, 215-216, 218, 225, 230, 234, 235) permitted witnesses to testify that in addition to the fair rental value of the property and the reproduction cost of improvements, as shown on Exhibit 26 (R 67, 71-73, 78-79, 276-277, 284, 445-453), they attributed to the leasehold an additional "ready-to-go" value. The "ready-to-go" value is based upon what an alleged purchaser of the leasehold (combined with the equipment and the business) would be willing to pay for the leasehold combined with the equipment and business in order to go into possession and immediately produce pharmaceutical supplies, thus avoiding all delays incidental to getting the plant operating (R 209, 225-227). The valuation is based upon an estimate of the value of anticipated profits resulting from business to be conducted on the leased premises (R 212, 227-228). The evidence supporting the claim of so-called "ready-to-go" value which was receive over objection (R 208, 210, 212, 215-216, 218, 225, 230, 234, 235) and which the court refused to strike and allowed to go to the jury (R 218-219, 235, 411) may be briefly summarized as follows:

MICHAEL FRANK CHARLEY, a Chicago pharmaceutical manufacturer unfamiliar with real estate values (R 215) testified that in addition to the cost of the improvements in the cafeteria building, and the cost of the annex and expenses incidental to moving and installing the laboratory equipment shown on Exhibit 26, (R 67, 71-73, 78-79, 276-277, 284, 446) this lease had a ready-to-go value of $75,000, for one to take over the plant with all the equipment coordinated for manufacturing (R 208-209). This ready-to-go value is based upon a combined

sale of leasehold, laboratory equipment and business (R 209). This $75,000 is in addition to the value of the laboratory equipment (R 209). This premium of $75,000 is based on the fact that even if you have the equipment "to start from scratch with an empty building, no matter how well you plan it, you will run into a lot of confusion and have to shut down to change this and that to improve your methods of manufacture." (R 209). This ready-to-go value of $75,000 was based on the fact that he could make a profit of $5,000 a month (R 212). He admitted his entire opinion was based upon profits (R 215-216). If the business was losing money he would not pay this price for the leasehold (R 216). In ordinary times Charley would not pay for the ready-to-go value, but in 1942 the war orders were very large (R 210). It would take eight or nine months to assemble the equipment in July, 1942 and it would take "another six months to get all the kinks out of it to get it operating properly" (R 211).

DAVID KLEIN. This witness, likewise a Chicago pharmaceutical manufacturer unfamiliar with real estate values (R 227) testified substantially the same as Charley. That over and above the claimed improvements of $41,762.92 shown on Exhibit 26 (R 67, 71-73, 78-79, 276-277, 284, 446) he testified

> "that it would have been worth $80,000 for the privilege of taking that equipment as such and operating." (R 225).

This going value of $80,000 was based upon the fact that a plant all set up has a much greater value than a plant on paper, and you could immediately start to fill orders (R 226). This was over and above the laboratory equipment and is based upon a combined sale of the leasehold and laboratory equipment and business (R 225, 227). The

figure as to "ready-to-go" value was based entirely upon future profits (R 227-228, 230, 234).

The verdict and judgment were of necessity based in large part upon this testimony which was allowed to stand and go to the jury, because the jury verdict of $48,331.35 exceeded Lakeside's only evidence as to the cost of improvements which totalled about $40,000. The District Judge throughout the entire trial expressed grave doubt as to the validity of the claim for "ready-to-go" value (R 55, 173, 218-219, 278, 288, 320, 411, 412). The trial judge, though receiving the proof pertaining to "ready-to-go" value repeatedly stated that the government did not take the machinery nor the business and that the same could not be compensated for (R 55, 174, 400, 375, 408).

The District Court held that the sale clause of $4,500 (R 429) the amount to be paid to the respondent upon sale of the leased property was inapplicable (R 409). It also held that the condemnation clause (R 301, 329, 349, 409) inapplicable. The Circuit Court of Appeals affirmed the judgment, Judge Evans dissenting as to the inapplicability of the sale clause. The Circuit Court of Appeals apparently held that its decision in the General Motors Case, as modified and affirmed by this Court, determined that "ready-to-go" value claimed by Lakeside was proper. The Circuit Court of Appeals admitted, however, that the General Motors Case was "not completely parallel."

QUESTIONS PRESENTED

A. Whether on condemnation by the United States of real estate only (an entire leasehold), just compensation includes so-called "ready-to-go" value (over and above the fair market value of the real estate), which so-called

"ready-to-go" value is based upon what an alleged purchaser of the interest in real estate combined with the machinery and the business would be willing to pay in order to go into possession and continue production and avoid all delays, expense and inconvenience incidental to getting the equipment and business operating, and which was arrived at by estimating the value of attainable future profits of a pharmaceutical business to be operated on the real estate?

B. Whether in a condemnation of the entire term of a leasehold the lessee is entitled to claim the reproduction cost of improvments and cost of installing machinery (Exhibit 26 (R 67, 71-73, 78-79, 276, 277, 284, 445-453), unaccompanied by any evidence of the value of the use, where under the terms of the lease all improvements made by lessee were lessor's property subject to lessee's right to use the same during the balance of the demised term? (R 417, 429).

C. Whether in condemnation by the United States a lease stipulation (R 428) fixing the amount to be paid to the lessee on sale of the leased premises is inapplicable where the lease contains a condemnation clause which, as construed below, excludes condemnation by the United States?

D. Whether a condemnation clause in a lease (R 419) which is inclusive of condemnation "by any company or corporation lawfully qualified to exercise the right of eminent domain" applies to a condemnation by the United States?

REASONS FOR GRANTING THE WRIT

A. In the instant case the Government took the entire fee of Eline's, and the entire leasehold of Lakeside, and hence as the Circuit Court of Appeals purported to recognize the facts differ from those of the *General Motors Case*. How-

ever, the decision of the Circuit Court of Appeals in allowing on the supposed authority of *U. S. v. General Motors,* 65 S. Ct. 357, 89 1. ed. Adv. Op. 379, as a part of just compensation, "'ready-to-go" value which is a value over and above the fair market value of the real estate taken, and which is based upon what an alleged purchaser of real estate combined with the equipment and business would be willing to pay in order to go into possession and start production and avoid all delays, expense and inconvenience incidental to getting the equipment and business operating (arrived at by a capitalization of obtainable future profits) is a decision of a federal question in a way probably in conflict with the applicable decisions of this court, particularly those of *Mitchell v. United States,* 267 U. S. 341, *Bothwell v. United States,* 254 U. S. 231, and *United States ex rel T. V. A. v. Powelson,* 319 U. S. 266. Although this Court in the General Motors Case denied that it was overruling the long line of decisions of this court relating to consequential damages, the Circuit Court of Appeals in this case has in effect construed the decision in the *General Motors Case* as reversing the rules of consequential damages.

Petitioner has been informed that the government has filed or will shortly file a petition for writ of certiorari to review a decision in *United States of America v. Petty Motors* (CCA 10, March 5, 1945) 147 Fed. (2) 912 in which the tenth circuit has likewise construed this Court's decision in the *General Motors Case* 65 S. Ct. 357, 89 1. ed. 379, as reversing the rule of consequential damages in leasehold cases.

B. The decision of the Circuit Court of Appeals in allowing a lessee to recover the reproduction cost of improvements and cost of installing equipment, unaccompanied by any evidence of the value of the use (where under the terms

of the lease all improvements made by lessee were lessor's property subject to lessee's right to use the same during the balance of the demised term (R 417, 429)) is in conflict with *Carlock v. United States,* 53 Fed. (2) 926, 927 (C. C.A. D. of C.) and other decisions, and is an important question of Federal Law relating to compensation in condemnation which has not, but should be settled by this Court.

C. The decision of the Circuit Court of Appeals holding that the liquidated damage or sale clause does not limit the compensation recoverable from the United States for the taking of respondent's leasehold seems to involve an important question of Federal law relating to compensation under the Fifth Amendment, payable to a lessee, which has not been but should be settled by this Court.

D. The decision of the Circuit Court of Appeals holding that the United States is not a corporation within the meaning of the condemnation clause of the lease seems to involve an important question of Federal law which has not been but which should be settled by this Court.

WHEREFORE, this petitioner prays that a writ of certiorari be granted so that this case may be reviewed by this Court; and that the judgment herein of said Circuit Court of Appeals be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated, May 17, 1945.

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